

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION**

BRENT RAY BREWER,

Petitioner,

v.

**LORIE DAVIS,
Director, Criminal Institutions Division,
Texas Department of Criminal Justice.**

Respondent.

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CIVIL ACTION

No. 2:15-CV-50-D

THIS IS A CAPITAL CASE

**MOTION FOR LEAVE TO FILE APPENDIX TO
SECOND AMENDED FEDERAL HABEAS CORPUS PETITION**

Petitioner Brent Brewer, through undersigned counsel, seeks leave to file an appendix to his second amended petition for writ of habeas corpus and in support states:

On March 30, 2020 Petitioner filed his Second Amended Petition for Writ of Habeas Corpus in this matter. ECF No. 103. Petitioner also filed an appendix to his petition.

On April 1, 2020 this Court struck Petitioner's appendix. *See* ECF No. 105. In doing so, this Court noted that Petitioner failed to indicate which exhibits in the appendix had been presented to state courts. *Id.*

Petitioner respectfully requests leave to refile his appendix with an updated index, indicating which exhibits were previously introduced in state court proceedings (attached).

In its order striking Petitioner's appendix, this Court also wrote that it could not consider any exhibits that Petitioner failed to present in state court under *Cullen v. Pinholster*, 563 U.S. 170 (2011). ECF No. 105 at 2. However, as Petitioner has set forth previously, *Pinholster* only excludes new factual allegations for the purpose of "review under § 2254(d)(1)." 563 U.S. at 181. *See, e.g.,* Reply in Support of Amended Petition for Writ of Habeas Corpus, Aug. 5, 2016, ECF No. 48.

Pinholster does not preclude a federal court from considering new factual support, or permitting additional factual development, in making the ultimate, and separate, decision whether a constitutional violation has occurred. *See, e.g., Pinholster*, 563 U.S. at 205 (Breyer, J., concurring) (“If the federal habeas court finds that the state-court decision fails [§ 2254](d)’s test (or if (d) does not apply), then a[] hearing [under § 2254(e)(2) may be needed.”). Likewise, *Pinholster* does not bar consideration of new evidence regarding other topics outside §2254(d)(1), such as direct appeal or state habeas counsel’s performance for the purposes of cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012). Here, Petitioner appendix contains several such exhibits. *See, e.g.,* Appendix, Exhibits 1, 65, 66.

This Court has ordered Respondent to provide a set of all records filed in Petitioner’s most recent state habeas corpus proceedings. ECF No. 93. However, Petitioner’s appendix contains several exhibits not presented in state court. Regardless of this Court’s ultimate determination of whether it can consider those exhibits, in order for this Court to conduct such an analysis, and in order for the parties to submit arguments regarding this topic, these exhibits must first be presented to the Court and made part of the record, as Petitioner attempted by filing his appendix.

Wherefore, Petitioner requests that this Court grant leave to file his Appendix to Second Amended Petition for Writ of Habeas Corpus.

Respectfully submitted,

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April 13, 2020

/s/ Peter Walker
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CERTIFICATE OF CONFERENCE

I hereby certify that I have conferred with counsel for Respondent, Assistant Attorney General Erich Dryden, who indicated his office opposes his motion.

/s/ Peter Walker
Peter Walker

Dated: April 13, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this date, I served the foregoing motion on the following by operation of the electronic case filing system:

Erich Dryden
Assistant Attorney General
Office of the Attorney General of Texas
Post Office Box 12548
Austin, Texas 78711-2548

/s/ Peter Walker
Peter Walker

Dated: April 13, 2020